

RECOVERY AGREEMENT

This RECOVERY AGREEMENT is entered into this 2nd day of March, 2020, by and between the United States Fish and Wildlife Service (Service) and Berlaimont Estates LLC – a Colorado limited liability company (Water User).

WHEREAS, in 1988, the Secretary of Interior, the Governors of Wyoming, Colorado and Utah, and the Administrator of the Western Area Power Administration signed a Cooperative Agreement to implement the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (Recovery Program); and

WHEREAS, the Recovery Program is intended to recover the endangered fish while providing for water development in the Upper Basin to proceed in compliance with state law, interstate compacts and the Endangered Species Act; and

WHEREAS, the Colorado Water Congress has passed a resolution supporting the Recovery Program; and

WHEREAS, on December 20, 1999, the Service issued a programmatic biological opinion (1999 Opinion) concluding that implementation of specified elements of the Recovery Action Plan (Recovery Elements), along with existing and a specified amount of new depletions, are not likely to jeopardize the continued existence of the endangered fish or adversely modify their critical habitat in the Colorado River subbasin within Colorado, exclusive of the Gunnison River subbasin; and

WHEREAS, the 1999 Opinion in the section entitled “Reinitiation Notice” divided depletions into Category 1 or Category 2 for reinitiation purposes; and

WHEREAS, Water User is the owner of the proposed Berlaimont Estates residential development (Water Project), which causes or will cause depletions to the Colorado River subbasin within Colorado, exclusive of the Gunnison River subbasin; and

WHEREAS, Water User desires certainty that its depletions can occur consistent with section 7 and section 9 of the Endangered Species Act (ESA); and

WHEREAS, the Service desires a commitment from Water User to the Recovery Program so that the Program can actually be implemented to recover the endangered fish and to carry out the Recovery Elements.

NOW THEREFORE, Water User and the Service agree as follows¹:

1. The Service agrees that implementation of the Recovery Elements specified in the 1999 Opinion will avoid the likelihood of jeopardy and adverse modification under section 7 of the ESA, for depletion impacts caused by Water User's Water Project. Any consultations under section 7 regarding Water Project's depletions are to be governed by the provisions of the 1999 Opinion. The Service agrees that, except as provided in the 1999 Opinion, no other measure or action shall be required or imposed on Water Project to comply with section 7 or section 9 of the ESA with regard to Water Project's depletion impacts or other impacts covered by the 1999 Opinion. Water User is entitled to rely on this Agreement in making the commitment described in paragraph 2.

2. Water User agrees not to take any action which would probably prevent the implementation of the Recovery Elements. To the extent implementing the Recovery Elements requires active cooperation by Water User, Water User agrees to take reasonable actions required to implement those Recovery Elements. Water User will not be required to take any action that would violate its decrees or the statutory authorization for Water Project, or any applicable limits on Water User's legal authority. Water User will not be precluded from undertaking good faith negotiations over terms and conditions applicable to implementation of the Recovery Elements.

3. If the Service believes that Water User has violated paragraph 2 of this Recovery Agreement, the Service shall notify both Water User and the Management Committee of the Recovery Program. Water User and the Management Committee shall have a reasonable opportunity to comment to the Service regarding the existence of a violation and to recommend remedies, if appropriate. The Service will consider the comments of Water User and the comments and recommendations of the Management Committee, but retains the authority to determine the existence of a violation. If the Service reasonably determines that a violation has occurred and will not be remedied by Water User despite an opportunity to do so, the Service may request reinitiation of consultation on Water Project without reinitiating other consultations as would otherwise be required by the "Reinitiation Notice" section of the 1999 Opinion. In that event, the Water Project's depletions would be excluded from the depletions covered by 1999 Opinion and the protection provided by the Incidental Take Statement.

4. Nothing in this Recovery Agreement shall be deemed to affect the authorized purposes of Water User's Water Project or The Service' statutory authority.

5. The signing of this Recovery Agreement does not constitute any admission by Water User regarding the application of the ESA to the depletions of Water User's Water Project. The signing of this Recovery Agreement does not constitute any agreement by either party as to whether the flow recommendations for the 15-mile reach described in the 1999 Opinion are biologically or hydrologically necessary to recover the endangered fish.

¹Individual Recovery Agreement may be changed to fit specific circumstances.

6. This Recovery Agreement shall be in effect until one of the following occurs.

- a. The Service removes the listed species in the Upper Colorado River Basin from the endangered or threatened species list and determines that the Recovery Elements are no longer needed to prevent the species from being relisted under the ESA; or
- b. The Service determines that the Recovery Elements are no longer needed to recover or offset the likelihood of jeopardy to the listed species in the Upper Colorado River Basin; or
- c. The Service declares that the endangered fish in the Upper Colorado River Basin are extinct; or
- d. Federal legislation is passed or federal regulatory action is taken that negates the need for [or eliminates] the Recovery Program.

7. Water User may withdraw from this Recovery Agreement upon written notice to the Service. If Water User withdraws, the Service may request reinitiation of consultation on Water Project without reinitiating other consultations as would otherwise be required by the "Reinitiation Notice" section of the 1999 Opinion.



Water User Representative

Vaclav Vochoska, Berlaimont Estates

3/2/2020
Date



Western Colorado Supervisor
U.S. Fish and Wildlife Service

3/6/2020
Date

